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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 479

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES A. BRUUN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1939
CERTIORARI GRANTED NOVEMBER 22, 1939

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,429

TAX REVIEW.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

vs.

CHARLES A. BRUUN, RESPONDENT.

ON PETITION TO REVIEW DECISION OF UNITED STATES BOARD OF TAX APPEALS.

FILED FEBRUARY 15, 1939.

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[fol. 1] Docket Entries.

Charles A. Bruun, Petitioner,
Docket No. 89454. vs.
Commissioner of Internal Revenue, Respondent.

Appearances.

For Taxpayer: L. E. Durham, Esq., Wm. J. Carroll, Esq., Wright Conrad, Esq., John H. McEvers, Esq., Reece A. Gardner, Esq.,

For Comm'r.: W. W. Kerr, Esq.

1937

Jun. 14—Petition received and filed. Taxpayer notified. (Fee Paid.)

" 14—Copy of petition served on General Counsel.

" 29—Notice of the appearance of L. E. Durham as counsel for taxpayer filed.

Jul. 15—Answer filed by General Counsel.

" 24—Copy of answer served on taxpayer.

Aug. 6—Motion for circuit hearing in Kansas City filed by taxpayer. 8/7/37 granted.

Sep. 7—Notice of the appearance of Wright Conrad as counsel for taxpayer filed.

1938

Aug. 24—Hearing set Oct. 17, 1938 at Kansas City, Missouri.

Sep. 19—Notice of appearance of John H. McEvers and Reece A. Gardner as counsel for taxpayer filed.

Oct. 17—Hearing had before Mr. Opper, Div. 14 on merits. Submitted. Stipulation of facts filed at hearing. Judgment for the petitioner. No briefs.

" 21—Transcript of hearing of Oct. 17, 1938, filed.

" 22—Memorandum opinion rendered, Clarence V. Opper, Div. 14. Decision will be entered for the petitioner.

" 22—Decision entered, C. R. Arundell, Div. 7.

1939

Jan. 6—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by General Counsel.

" 18—Proof of service filed by General Counsel. (4) 3 Attorneys and taxpayer.

" 30—Praecipe for record filed by General Counsel.

Feb. 7—Proof of service of praecipe filed by General Counsel. (2) Attorneys.

[fol. 2] (Petition of Charles A. Bruun for Appeal.)

(Filed June 14, 1937, U. S. Board of Tax Appeals.)

United States Board of Tax Appeals.

Charles A. Bruun, Petitioner;
Docket No. 89454. vs.
Commissioner of Internal Revenue, Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the respondent in his notice of deficiency (Bureau symbols IT:C:1 SB 90D), dated March 17th, 1937, and as a basis for his proceeding alleges as follows:

1. The petitioner is an individual, residing at No. 8619 Holmes Street, Kansas City, Missouri.

2. That the notice of deficiency (copy of which, together with copy of so much of the statement accompanying the same as is material hereto, marked respectively Petitioner's Exhibits 1 and 2, are hereto attached) was mailed to petitioner on, to-wit, March 17th, 1937.

3. The taxes in controversy are income taxes for the calendar year 1933 in the amount of, to-wit, Four Thousand One Hundred Eleven and 43/100 Dollars ($4,111.43).

[fol. 3] 4. The determination of tax set forth in said notice of deficiency is based upon the following errors, to-wit:

(a) Respondent erred in adding, under Section 22(a) of the Revenue Act of 1932, and Article 63 of Regulations 77, as amended by Treasury Decision 4539, Internal Revenue Cumulative Bulletin XIV-I, page 141, the sum of, to-wit, Fifty-One Thousand Four Hundred Thirty-Four and 25/100 Dollars ($51,434.25) as income derived by petitioner during the calendar year 1933 on or from the cancellation of the 99-year lease referred to in [respondent's] written statement (Petitioner's Exhibit a), for the reason that petitioner did not derive any income whatsoever on or from the cancellation of said lease within the meaning of Amendment Sixteenth of the Constitution of the United States of America.

(b) Respondent erred in adding, under Section 22(a) of the Revenue Act of 1932, and Article 63 of Regulations 77, as amended by Treasury Decision 4539, Internal Revenue Cumulative Bulletin XIV-I, page 141, the sum of, to-wit, Fifty-One Thousand Four Hundred Thirty-Four and 25/100 Dollars ($51,434.25), as income derived by petitioner during the calendar year 1933 on or from the cancellation of the 99-year lease referred to in respondent's written statement (Petitioner's Exhibit 2), for the reason that said Section 22(a) of the Revenue Act of 1932, and said Article 63 of Regulations 77, as amended by said Treasury Decision 4539, as applied by respondent to the cancellation [fol. 4] of the lease aforesaid, and to the improvements erected under said lease upon the land thereby let, imposes on the property of petitioner a direct property tax not apportioned in accordance with the population of the States, in contravention of Section 2 of Article I of the Constitution of the United States of America.

(c) Respondent erred in adding, under Section 22(a) of the Revenue Act of 1932, and Article 63 of Regulations 77, as amended by Treasury Decision 4539, Internal Revenue Cumulative Bulletin XIV-I, page 141, the sum of, to-wit, Fifty-One Thousand Four Hundred Thirty-Four and 25/100 Dollars ($51,434.25) as income derived by petitioner during the calendar year 1933 on or from the cancellation of the 99-year lease referred to in [respond-

ent'w] written statement (Petitioner's Exhibit 2), in that he thereby deprived petitioner of petitioner's property, to-wit, said sum of Four Thousand One Hundred Eleven and 43/100 Dollars ($4,111.43) without due process of law, in violation of the Constitution of the United States of America, Amendment Fifth.

(d) Respondent erred in failing to deduct from the value, if any, of the improvements hereinafter mentioned, liens for accrued taxes and unpaid rent in the amounts hereinafter respectively alleged.

(e) The actions of respondent complained of herein were arbitrary and without warrant or authority in law.

[fol. 5] 5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) On July 1st, 1915, petitioner owned land in Kansas City, Jackson County, Missouri, described as follows, to-wit:

All of Lot Eighty-Seven (87) in Swope's Addition to the City of Kansas (now Kansas City), Missouri, as the same is shown, marked and designated upon the plat of said addition on file and of record in the office of the Recorder of Deeds of Jackson County, Missouri, subject, however, to such right as Kansas City may have to use for street purposes as a part of Twelfth Street a strip off the south side thereof supposed to be about six feet in width from north to south.

(b) On July 1st, 1915, by an agreement in writing, petitioner leased to Newmarket Investment Company (hereinafter sometimes referred to as "lessee"), a Missouri corporation, the above described lands for a term of ninety-nine (99) years from and including July 1st, 1915, to and including June 30th, 2014; that by said lease said lessee bound itself to pay certain rents for said land, which rents, during the year 1933, were payable at the rate of Twenty-Five Hundred Dollars ($2500.00) per month; and bound itself and agreed to pay promptly, before the same became delinquent and subject to penalties, all taxes, assessments or charges then or thereafter levied, laid, assessed or charged by any governmental authority under any then present or future law, upon or against said land or any

part thereof, or upon or against the buildings or improvements then or thereafter situated thereon or any part thereof, and continually to keep all said lands and all such build-
[fol. 6] ings and improvements and every right, title, interest or estate therein or thereto, free, clear and discharged of every such lien and incumbrance; that by the terms of said lease it was agreed between petitioner and said lessee that said lessee should have the right to tear down and remove any and all buildings then situated on said land and to take away the materials composing the same, and that lessee might at different times remove or tear down separate buildings then or thereafter situated upon said lands and take away the materials composing the same; Provided, that no such building should be removed or torn down after the year 2010, and that no building should be torn down or removed after said lease was forfeited, cancelled or in any way terminated.

Petitioner and said lessee further by said lease agreed that at such time as petitioner should recover or take possession of said land on account of any breach of any agreements, covenants or stipulations in said lease contained, or at the expiration of the term thereof by lapse of time, or other termination of said lease, all buildings, fixtures, appliances and improvements placed on said land, or any part or parts thereof, should become, be and remain the property of petitioner, and that the lessee should at any such time yield up the same to petitioner without compensation therefor; that in case said lessee should fail to pay the rents in said lease reserved at the time and place therein provided, or if it should fail to keep and perform any of the other covenants, agreements or stipulations
[fol. 7] therein contained, by said lessee to be kept and performed, then such lease might, at the option of petitioner, be and become forfeited, null, void and of no effect; that the said lease might, with the consent of petitioner, be by said lessee assigned; that said lessee was not by said lease bound or obligated to construct or build any building on said land, but that if it proceeded so to do, it was required to do so at its own cost and expense.

(c) That the leasehold estate created by said written agreement was by said lessee, by its deed of trust dated November 1, 1929, conveyed to one William E. Graves,

as Trustee, in security for a certain indebtedness in said deed of trust described.

(d) That on or about April 26th, 1933, said William E. Graves, Trustee, duly advertised and sold the interest of said Newmarket Investment Company in said leasehold estate to Newmarket Holding Company, a Missouri corporation.

(e) That thereafter default was made in the payment of the rent due for said premises for the month beginning June 1st, 1933, and that default was made in the payment of taxes assessed against said land and improvements thereon aggregating the amount of, to-wit, Eight Thousand Two Hundred Thirty-Seven and 41/100 Dollars ($8,237.41), and that petitioner duly gave notice of his intention to declare a forfeiture of said lease for failure to pay said rent and said taxes.

[fol. 8] (f) That thereafter said Newmarket Holding Company did, on or about the 29th day of June, 1933, convey to petitioner by quitclaim deed, and surrender said lease, and the same was by petitioner terminated.

(g) Petitioner further states that prior to the date of the termination of said lease said Newmarket Investment Company had removed buildings and improvements on said land existing at the date of said lease and had erected thereon the improvements here involved, and that said last mentioned improvements were situated on said land at the date of the termination of said lease.

(h) Petitioner states that said land and improvements at the date of termination of said lease were subject to liens for unpaid taxes, as aforesaid, in the amount of Eight Thousand Two Hundred Thirty-Seven and 41/100 Dollars ($8,237.41), and that the fair value of said improvements was reduced to the extent of said [liend].

(i) Petitioner states that the aforesaid improvements on said land at the date of cancellation of said lease were affixed to, had become and were a part of said land, and had no existence separate and apart from said land.

(j) Petitioner further states that at the date of termination of said lease he did not lease and could not have

leased said land or said land and improvements for any term whatever upon conditions as favorable to him as those contained in said lease.

[fol. 9] (k) Petitioner further states that the cost of said improvements, as calculated by respondent and shown upon his said statement (Petitioner's Exhibit 2) does not reflect the fair value of said improvements, in that respondent did not deduct therefrom the aggregate amount of the taxes and rent unpaid, as aforesaid, at the date of the termination of said lease.

(l) Petitioner further states that by reason of the business depression at the date of the cancellation of said lease and still existing, the cost of said improvements as calculated by respondent upon his said statement (Petitioner's Exhibit 2) did not reflect the fair value of said improvements, and that on the contrary said improvements at the date of cancellation of said lease were worthless and without value.

(m) Petitioner further states that the existence of said improvements at the date of termination of said lease greatly impaired the lease value of said land, in that had said Newmarket Investment Company removed the same therefrom under the terms of said lease, said lot, unimproved, could have been readily leased for automobile parking purposes.

Wherefore, petitioner prays that this Honorable Board may hear this proceeding and determine that there is no deficiency due from petitioner for income taxes for the [fol. 10] calendar year 1933.

L. E. DURHAM,
WRIGHT CONRAD,
WILLIAM J. CARROLL,
Counsel for Petitioner,
901 National Fidelity Life Building,
Kansas City, Missouri.

State of Arkansas,
County of Garland.—ss.:

Charles A. Bruun, being first duly sworn, says that he is the petitioner above named; that he has read the foregoing

petition and is familiar with the statements contained therein and that the facts there stated are true.

CHARLES A. BRUUN.

Subscribed and sworn to before me this 11th day of June, 1937.

(Seal) ELIZABETH CANADAY,
Notary Public.

My commission expires May 17, 1938.

[fol. 11] Petitioner's Exhibit 1.

(SEAL)

Treasury Department
Washington

Office of
Commissioner of Internal Revenue

Mar. 17, 1937.

Mr. Charles A. Bruun,
8619 Holmes Street,
Kansas City, Missouri.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) 1933 discloses a deficiency of $4,111.43, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this

form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By Chas. T. Russell,
Deputy Commissioner.

Enclosures:
Statement
Form 870

[fol. 12] Petitioner's Exhibit 2.

Statement

IT:C 1
SB-90D

In re: Mr. Charles A. Bruun,
8619 Holmes Street,
Kansas City, Missouri.

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1933	$4,111.43	None	$4,111.43

The deficiency shown herein is based upon the report dated August 27, 1935, prepared by Revenue Agent E. R. Graham, a copy of which was transmitted to you and upon such adjustments as are shown below.

Careful consideration has been given to your protests dated October 4, 1935 and January 27, 1937 in connection with the report of the internal revenue agent in charge and the information submitted at conferences held in the office of that official.

You hold that the value of improvements reverting to you upon the cancellation of a ninety-nine year lease does not represent income and that the provisions of Treasury Decision 4539 (published in Internal Revenue Cumulative Bulletin XIV-1, page 141) amending article 63 of Regulations 77 are invalid. You rely upon the decision in the

case of the Hewitt Realty Company, 76 Fed. (2d) 880, C. C. A. 2. You are advised that the decision in this case is not being followed by the Bureau.

You contend also that the appraised value of $82,609.92 found by the revenue agent is greatly in excess of the reasonable market value of the improvements as of July 1, 1933.

The question of the value of the improvements as of July 1, 1933 has been given consideration and it is held, upon the basis of the information on file, that the value of the improvements as of that date is $64,245.68.

[fol. 13]

Computation of your revised income and tax liability follows:

Net loss reported on return		($18,317.08)
Add:		
1. Profit on cancellation of lease	$51,434.25	
2. Other deductions	974.84	52,409.09
Total		$34,092.01
Deduct:		
3. Additional depreciation	$ 642.93	
4. Capital loss	974.84	1,617.77
Total net income adjusted		$32,474.24
Plus:		
Capital net loss included		974.84
Ordinary net income adjusted		$33,449.08
Less:		
Personal exemption		2,500.00
Net income subject to normal tax		$30,949.08
Normal tax at 4% on $ 4,000.00		$ 160.00
Normal tax at 8% on $26,949.08		2,155.93
Surtax on $33,449.08		1,917.36
Total		$ 4,233.29
Less:		
12½% of capital net loss $974.84		121.86
Balance		$ 4,111.43
Corrected income tax liability		$ 4,111.43
Income tax assessed, original, account #68928		None
Deficiency		$ 4,111.43

[fol. 14] Explanation of Changes.

1. Treasury Decision 4539, published in Internal Revenue Cumulative Bulletin XIV-1, page 141, provides in part as follows:

"If the lease is terminated so that the lessor comes into possession or control of the property prior to the time originally fixed for the expiration of the lease, the lessor shall report income for the year in which the lease is so terminated to the extent that the value of such buildings or improvements when he becomes entitled to such possession exceeds the amount already reported as income on account of the erection of such buildings or improvements."

It appears that no income has been previously reported by you from the improvements, since the life of the building was less than the remaining term of the lease. Gain on the cancellation of a lease after the lessee had erected a new building on premises at Twelfth Street and Grand Avenue has, therefore, been determined as follows:

Value of building on July 1, 1933		$64,245.68
Deduct:		
Unextinguished cost of old buildings demolished in 1929	$13,365.00	
Less:		
Amortization based on leasehold to 1933;		
Date of ninety-nine-year lease, July 1, 1915		
Remaining life of lease on December 31, 1929 84½ years		
$13,365.00 ÷ 84½ equals $158.165		
December 31, 1929 to July 1, 1933 3½ years		
3½ years at $158.165 per year equals	553.57	12,811.43
Income upon cancellation of lease in 1933		$51,434.25

[fol. 15] (Answer of Commissioner of Internal Revenue.)

(Filed July 15, 1937, United States Board of Tax Appeals.)

United States Board of Tax Appeals.

Charles A. Bruun, Petitioner,

Docket No. 89454. vs.

Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named taxpayer, admits and denies as follows:

1. Admits the allegations of paragraph 1.

2. Admits the allegations of paragraph 2.

3. Admits the taxes in controversy are income taxes for the calendar year 1933. Denies the remainder of the allegations contained in paragraph 3.

4-(a), (b), (c), (d) and (e). Denies the Commissioner erred in respect to the matters alleged in subparagraphs (a), (b), (c), (d) and (e) of paragraph 4.

5-(a). Admits on July 1, 1915 the petitioner owned land in Kansas City, Jackson County, Missouri, at the Northeast corner of 12th Street and Grand Avenue. Denies the remainder of the allegations contained in subparagraph (a) of paragraph 5.

5-(b). Admits on July 1, 1915 by an agreement in writing petitioner leased to Newmarket Investment Company the above-described lot for a term of 99 years. Denies the remainder of the allegations contained in subparagraph (b) of paragraph 5.

[fol. 16] 5-(c). Denies the allegations contained in paragraph 5-(c).

5-(d). Denies the allegations contained in paragraph 5-(d).

5-(e). Denies the allegations contained in paragraph 5-(e).

5-(f). Admits the lease was surrendered to the petitioner on or about June 29, 1933. Denies the remainder of the allegations contained in subparagraph (f) of paragraph 5.

5-(g). Admits that prior to the date of the termination of the said lease certain buildings and improvements on said land existing at the date of the said lease were removed and new buildings and improvements were made thereon, which were situated on said land at the date of the

termination of the said lease. Denies the remainder of the allegations contained in subparagraph (g) of paragraph 5.

5-(h). Denies the allegations contained in paragraph 5-(h).

5-(i). Denies the allegations contained in paragraph 5-(i).

5-(j). Denies the allegations contained in paragraph 5-(j).

5-(k). Denies the allegations contained in paragraph 5-(k).

5-(l). Denies the allegations contained in paragraph 5-(l).

5-(m). Denies the allegations contained in paragraph 5-(m).

6. Denies generally and specifically, each and every allegation contained in taxpayer's petition, not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. E. Marshall,
C. R. Marshall,
Special Attorneys,
Bureau of Internal Revenue.

CRM 7-13-37.

[fol. 17] Stipulation of Facts.

(Filed at Hearing October 17, 1938, U. S. Board of Tax Appeals.)

United States Board of Tax Appeals.

Charles A. Bruun, Petitioner,
Docket No. 89454 vs.
Commissioner of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the material facts herein are as follows:

1. Charles A. Bruun, the petitioner herein, is and at all of the times hereinafter mentioned was an individual and a resident of Kansas City, Jackson County, Missouri.

2. Between and including the first day of July, 1915, and the first day of July, 1933, petitioner owned Lot Eighty-seven (87) in Swope's Addition to the City of Kansas (now Kansas City), Missouri, which is located at the Northeast corner of Twelfth Street and Grand Avenue.

[fol. 18] 3. On July 1, 1915, petitioner leased the said real estate for a term of ninety-nine years to Newmarket Investment Company, a corporation, under a written indenture of lease, copy of which is attached hereto, marked "Exhibit A."

4. At the time of the execution of said lease there was a building upon said property and said building remained thereon until 1929. At that time it had an undepreciated cost to the petitioner of $13,365. During 1929, the lessee demolished and removed said building from the premises and prior to December 31, 1929, the lessee constructed a new building upon said premises, which had a useful life of not more than fifty years.

5. The lessee continued to occupy the premises and pay the rent provided for in said lease until March, 1933, when it defaulted in the payment of rent.

6. On July 1, 1933, the lessee being in default in the payment of rent and taxes, the lease was cancelled and the property, together with the building then thereon, turned over to the petitioner.

7. It is further stipulated and agreed that as at said date, July 1, 1933, the building which had been erected upon said premises by the lessee had a fair market value of $64,245.68 and that the unamortized cost of the old building, which was removed from the premises in 1929 to make way for the new bulding, was $12,811.43, thus leaving a net fair market value as at July 1, 1933, of $51,434.25, for the aforesaid new building erected upon the premises by the lessee.

[fol. 19] 8. On or before March 15, 1934, the petitioner filed with the Collector of Internal Revenue for the Sixth

Internal Revenue Collection District at Kansas City, Missouri, a federal income tax return, in which he did not report any income as resulting to him from the cancellation of the above lease and the taking of possession by him of said property. In auditing his return the Commissioner of Internal Revenue determined that as a result of said transaction he sustained a net gain of $51,434.25, being the difference between $64,245.68, the aforesaid value on July 1, 1933, of the building erected upon said premises by the lessee, and $12,811.43, the adjusted cost base of the building demolished and removed from the premises by the lessee in 1929. Accordingly, he determined a deficiency of $4,111.43, and on March 17, 1937, forwarded the petitioner notice thereof. A copy of said notice is attached to the petition filed herein and marked "Petitioner's Exhibit 1."

9. If the Commissioner of Internal Revenue properly included in the gross income of the petitioner for 1933 the fair market value as of that time of the building constructed upon said premises by the lessee, the deficiency herein is $4,111.43. On the other hand, if his action in including the fair market value of said building in income of the petitioner was erroneous, there is no deficiency in tax.

[fol. 20] Dated this 11th day of October, 1938.

By John H. McEvers,
Reece A. Gardner,
Counsel for Petitioner.

J. P. Wenchel,
Chief Counsel for Bureau of Internal Revenue,
Counsel for Respondent.

[fol. 21] Exhibit A.

This Indenture Made this First day of July, Nineteen hundred and fifteen, by and between Charles A. Bruun, first party and Myrtle M. Bruun, his wife, second party and Newmarket Investment Company, a corporation created, organized and existing under and by virtue of the laws of the State of Missouri, third party, Witnesseth:

In consideration of the rents, covenants and agreements to be paid, kept and performed by third party as herein set out and subject to all the terms, conditions and agreements herein contained first party does hereby let, demise and lease, in the present condition thereof, unto the third party, for a term of ninety-nine (99) years, running from and including the First day of July, Nineteen hundred and fifteen up to and including the Thirtieth day of June, Two thousand and fourteen, land in Kansas City, in Jackson County, Missouri, described as follows, to-wit:

All of Lot Eighty-seven (87) in Swope's Addition to the City of Kansas (now Kansas City), Missouri, as the same is shown, marked and designated upon the plat of said addition on file and of record in the office of the Recorder of Deeds of Jackson County, Missouri, subject, however, to such right as Kansas City may have to use for street purposes as a part of Twelfth Street a strip off the south side thereof supposed to be about six feet [fol. 22] in width from north to south. Said land is let, demised and leased subject to the lien of all taxes and assessments that can not at the date hereof be paid and also subject to three certain leases for certain portions of the buildings at present upon the said lands, all of which leases expire at the end of June, Nineteen hundred and seventeen and being one lease dated the seventeenth day of September, Nineteen hundred and four made by James A. Bruun, as lessor, to Fred C. Morris, as lessee, which lease has been modified by agreement between Charles A. Bruun and Fred C. Morris, dated the fifth day of August, Nineteen hundred and eight; and one lease made by James A. Bruun, as lessor, to Abijah J. Brooks, as lessee, dated the second day of November, Nineteen hundred and four; and one lease made by Charles A. Bruun, as lessor, to Pabst Brewing Company, as lessee, dated the thirteenth day of December, Nineteen hundred and eleven, and the first party does hereby assign and transfer unto the said third party all rents payable under the said last three mentioned leases that may become due and payable while this lease remains in force and effect.

And for same consideration the said second party does hereby release unto the said third party all her right of dower in and to the said lands for and during and only

for and during the time that this instrument of lease may remain in force and effect.

It is further agreed by and between the parties hereto as follows:

[fol. 23] First: The third party shall, as rent for the said land, without any demand made therefor, pay to the first party, his heirs, devisees or assignees, in lawful money of the United States, the following sums at the times following, to-wit: Five thousand Dollars ($5000.00) at the delivery hereof, receipt whereof is hereby acknowledged, and One thousand Dollars ($1000.00) on the First day of each calendar month from and including the First day of July, Nineteen hundred and fifteen, up until the First day of July, Nineteen Hundred and eighteen and One thousand Six hundred and Sixty-six and 66/100 Dollars ($1666.66) on the First day of each calendar month from and including the First day of July, Nineteen hundred and eighteen up until the First day of July, Nineteen hundred and twenty-two and Two Thousand and Eighty-three and 33/100 Dollars ($2083.33) on the First day of each calendar month from and including the First day of July, Nineteen hundred and twenty-two up until the First day of July, Nineteen hundred and twenty-five and Two thousand Five hundred Dollars ($2500.00) on the First day of each calendar month from and including the First day of July, Nineteen hundred and twenty-five up until the First day of July, Two thousand and Fourteen.

Second: Said payments of rent shall be made at the office of Citizens' Savings Trust Company in Kansas City, Missouri, until some other place of payment may under the terms hereof be designated by the person or persons to whom the rent may under the terms hereof be payable. The person or persons to whom from time to time the rent [fol. 24] under the terms hereof is payable may from time to time designate the office of any bank or trust company in Kansas City, Missouri, as the place at which payments of rent thereafter maturing shall be made but notice in writing of any change of place of payment shall be given by the person or persons to whom at the time of such notice the rent may be payable, to the third party at least thirty (30) days in advance of the first payment required

to be made at any new place and after thirty (30) days from the giving of said notice all subsequent payments of rent shall be made at the place so designated until some other place may be designated. If at any time the original or any designated place of payment shall not exist and no other place of payment shall have been designated then the rent shall be paid on the premises hereby leased and as near the southwest corner thereof as can be conveniently done.

The receipt of the bank or trust company at whose office rents are from time to time payable shall fully discharge third party from any and all obligation to first party for the rental duly paid and so receipted for, without further evidence of the payment thereof. Provided, however, that the third party shall withhold from the monthly payments of rents aforesaid any tax on income required by law to be so withheld or any other tax required by law to be so withheld and paid by said third party.

Third: The third party shall pay promptly before the same become delinquent and before the same become subject to penalties all taxes, assessments or charges now or [fol. 25] hereafter levied, laid, assessed or charged by any country, government, state or municipality, or by any governmental authority or pursuant to any proceedings under any present or future law, upon or against said lands, or any part thereof, or upon or against any buildings or improvements now or hereafter situate thereon, or any part thereof, or upon or against any right, title, interest or estate in or to said lands, buildings, improvements, or any part or parts thereof, and continually keep all the said lands and all buildings and improvements now or hereafter situate thereon and every right, title, interest or estate in or to said lands, buildings or improvements, free, clear and discharged of every lien or incumbrance created by any present or future law, or created pursuant to any proceedings under any present or future law, it being provided, however, that if the said third party shall claim that any such tax, assessment, charge, lien or incumbrance is not lawful and shall within sixty (60) days after the first day any such tax, assessment, charge, lien or incumbrance could be paid notify the first party in writing of any such claim

that any such tax, assessment, charge, lien or incumbrance is not lawful, stating the reasons for such claim, then any such tax, assessment, charge, lien or incumbrance need not be paid until final judgment is had thereon, except, however, that if by provision of law a sale of said lands, buildings or improvements, or any part or parts thereof, or any right, title, estate or interest therein, may then be by law allowed to be made to pay or enforce any such tax, assessment, charge, lien or incumbrance without any final judgment being had, then even in case such notice is given [fol. 26] such tax, assessment, charge, lien or incumbrance shall be paid by third party at least ten (10) days before any such sale can be had. In case of failure of third party to pay any such tax, assessment, charge, lien or incumbrance at the time it is bound to pay the same under the provisions hereof then the first party may pay and discharge the same, or any judgment therefor, with all interest, costs and charges, without inquiring into the validity or lawfulness of the same and no matter whether the same be valid or lawful or not, and the third party will repay to first party the sum or sums so paid and for the sum or sums so paid by the said first party he shall, in addition to any other rights, remedies or actions agreed upon by the provisions of this lease or allowed by law, have a lien upon the interest of the third party in this lease and in said lands and in any buildings or improvements hereafter situate on said lands. Election by first party to pay as just hereinbefore set out shall not be deemed a waiver by him of any remedies or rights of forfeiture herein or by any present or future law given to him on account of the failure of third party to pay but the same shall remain and exist in force not-with-standing the payment by first party. On or before the tenth day of January and August of each year the third party shall leave for the first party at the place where the rent is then payable a certificate duly certified by a competent abstractor or proper public official showing that all such taxes, assessments, charges, liens and incumbrances agreed to be paid by third party have been [fol. 27] paid and discharged and that the interest of the first and third party in the said lands, buildings and improvements is free of all liens created by or pursuant to any present or future law or pursuant to any proceedings

under any present or future law which third party is bound to then pay but it is expressly provided, however, that nothing in this paragraph or in this instrument contained shall bind or subject third party to pay any such charges as are commonly known as and called inheritance taxes, nor any such charges as are commonly known as and called income taxes.

Fourth: The third party upon executing and delivering the bond hereinafter mentioned may whenever it chooses remove or tear down any building or buildings then situate on said land and take away the materials composing the same.

Before beginning to remove or tear down any building or buildings now situate on said land the third party shall execute and deliver to first party its bond for a penal sum equal to the rent of the said land for the next two years immediately following the date of said bond and before beginning to remove or tear down any building or buildings hereafter erected on said land the third party shall execute and deliver to first party its bond for the penal sum of sixty thousand dollars ($6000.00). Each and every bond so executed and delivered shall also be executed and delivered by some responsible person or persons or corporation as surety or sureties and shall be conditioned that the third party will for two years after beginning to so remove [fol. 28] or tear down pay to the person or persons to whom by the terms hereof the same are agreed to be paid, all rents by the terms of this lease agreed to be paid and during said two years perform all agreements and obligations contained in this lease and required by the terms of this lease to be performed by the third party. The said bond shall recite that it is given for the benefit of all persons who may during the said term of two years be entitled to receive such rents or enforce such agreements or obligations and shall be construed to be made for the benefit of all such persons and may be enforced by them or any of them. The third party may under the terms hereof at different times remove or tear down separate buildings now or hereafter situate upon said lands and take away the materials composing the same but it shall in each case before beginning said removing or tearing down execute and deliver to the

first party a bond of like effect with like surety and for like sum and conditioned, executed and delivered in like manner accordingly as any building to be removed or torn down is now situate on said land or is one hereafter erected thereon, provided, however, no building shall be removed or torn down after the year two thousand and ten, and no building shall be torn down or removed after this lease is forfeited cancelled or in any way terminated.

Fifth: At the time that the first party may recover or take possession of the said lands by reason of any suit wherein the judgment results in possession being taken of said lands by said first party, or at the time the said first [fol. 29] party may recover or take possession of the said lands on account of any breach of any agreements, covenants or stipulations herein contained, or at the time the terms of this lease may expire by lapse of time or otherwise terminate, then all buildings, fixtures, appliances and improvements placed upon the said lands, or any part or parts thereof, shall become, be and remain the property of the first party free of any claims, liens or incumbrances placed thereon by third party and the third party shall at all such times yield up the said buildings, fixtures, appliances and improvements into the possession of first party without any compensation therefor.

Sixth: In case the third party shall fail to pay the rents herein stipulated for at the place herein provided for at the time herein agreed upon, or if the third party shall fail to keep or perform any of the other covenants, agreements or stipulations in this lease contained and required to be kept and performed by it, then this lease may, at the option of the first party, be and become forfeited, null, void and of no effect and the term hereby created cease and terminate and the first party have the right to the possession of the said lands and all buildings and improvements, fixtures and appliances thereon and the same rights, privileges and remedies that he would have if the term herein created had expired by lapse of time instead of failure to pay rent or breach of any such covenants, agreements or stipulations, provided, however, that before declaring any [fol. 30] such forfeiture the first party shall give to the third party and to all such persons or parties as may have

acquired an interest in this lease by duly recorded assignments or conveyances, either as absolute conveyances or by way of security, and who shall have deposited for the first party at the place where the rent is at the time of depositing the notice hereafter mentioned payable a notice of the existence of their interest, written notice of their intention to declare such forfeiture, stating in such notice the cause of such forfeiture and setting forth, in case forfeiture is declared for failure to pay rent, that unless the rent is paid within thirty (30) days after the giving of such notice, or in case forfeiture is declared on account of breach of any other covenant, agreement or stipulation herein contained, that unless the covenant, stipulation or agreement claimed to have been broken is performed within thirty (30) days after the giving of such notice, that this lease will be declared forfeited; and if before the time set for declaring such forfeiture the said third party or some one for it shall pay the rent due or perform the agreement, covenant or stipulation claimed to have been broken, then the right of forfeiture shall not thereafter exist in so far as concerns the particular rent claimed in said notice not to have been paid or in so far as concerns the particular breach mentioned in said notice of any covenant, agreement or stipulation claimed to have been broken. In case notice is given of intention to declare forfeiture on account of the breach of any covenant, agreement or stipulation [fol. 31] contained in this lease other than the failure to pay rent it shall be considered a performance by the third party if it shall begin to perform such covenant, agreement or stipulation claimed to have been broken within thirty (30) days from the giving of such notice and prosecute to completion the work of performing such covenant, agreement or stipulation with all reasonable diligence. The right herein given to declare a forfeiture for non-payment of rent or for the breach of any covenant, stipulation or agreement contained in this lease shall not be construed as abrogating or waiving any rights or remedies for the recovery of lands or possession of the premises hereby leased given to or conferred on the first party by any present or future laws of any government or municipal authority, but the first party may declare the forfeiture or pursue his rights or remedies under any such laws or do both

at the same time. Each day of any continuing breach of any covenant, agreement or stipulation contained in this lease and agreed or required by the terms of this lease to be performed by the third party shall be a separate and distinct breach and no waiver of any breach or breaches of any such covenant, agreement or stipulation contained in this lease shall operate as a waiver of any subsequent breach of the same covenant, agreement or stipulation or of any other covenant, agreement or stipulation contained in this lease and by the terms of this lease required or agreed to be performed by the third party.

[fol. 32] Seventh: The third party shall not use or allow or permit to be used the said lands, or any part or parts thereof, or any buildings or improvements now or hereafter situate thereon, or any part or parts thereof, for any unlawful purpose, or in any manner now or hereafter forbidden by any law, ordinance or regulation of any country, state, government, municipality or governmental authority, and shall protect and save harmless the first party from all loss, cost, damage or expense caused or occasioned to him on account of any injury suffered by any person upon the said lands, buildings or improvements, or any part or parts thereof or upon any sidewalk, street or way on such lands or adjacent thereto.

Seventh: The first party may at all reasonable times enter upon and inspect the said lands, or any part or parts thereof and any buildings or improvements now or hereafter situate thereon, or any part or parts thereof.

Eighth: The third party shall indemnify the first party against and pay him all legal costs, charges, expenses and counsel fees lawfully and reasonably incurred in and about the premises in the defense of any suit brought to enforce any tax, assessment, charge, lien or incumbrance, or in obtaining possession after default by the third party or upon expiration of the term of this lease, provided any such suit is sustained and judgment in said suit rendered against first or third party.

[fol. 33] Ninth: The third party shall not, without the written consent of the first party convey, sell, assign, encumber, transfer, mortgage, pledge, convey by deed of trust or otherwise, or convey by any means or manner

whatever this lease, or any right or interest therein, unless the third party shall at such time have duly performed all agreements required or agreed by the terms of this lease to be performed by it before such time, but if at any time all agreements required or agreed by the terms of this lease to be theretofore performed by the third party have been duly performed, the third party shall then have the right to convey, sell, assign, incumber, transfer, mortgage, pledge, convey by deed of trust or otherwise, or convey by any means or manner whatever this lease, or any right or interest of third party therein without the consent of the first party. No assignment or transfer of this lease shall relieve the third party of any responsibility under the terms hereof unless the assignee shall in writing accept such assignment or transfer and agree to be bound by the terms of this lease nor unless the first party shall in writing consent to such assignment or transfer and any such assignment or transfer so made in writing and consented to by first party shall relieve third party from all obligations to thereafter perform any of the agreements required or agreed by the terms hereof to be kept by third party.

Tenth: All covenants, agreements and stipulations agreed and required by the terms of this lease to be kept [fol. 34] and performed by the third party or enforceable by it shall be construed as binding upon or enforceable by the successors of the third party by transfer or otherwise and upon or by any person or persons in any manner claiming by, through or under the third party and all covenants, agreements and stipulations herein contained and binding upon or enforceable by the first party shall be construed as binding upon and enforceable by all persons in any manner claiming by, through or under the said first party. The words "first party" as contained in this instrument shall unless qualified by other words be construed to mean not only the original first party as herein mentioned but all persons in any manner claiming by, through or under him and the words "third party" as contained in this instrument shall, unless qualified by other words, be construed to mean not only the original third party as herein mentioned but all its successors and all persons in any manner claiming by, through or under it, and unless expressly qualified by words of this instrument all

obligations of this instrument shall be binding upon and enforceable by all persons claiming by, through or under the first and third parties herein respectively in the same manner as if they had been specifically mentioned herein and bound hereby, but it being provided, however, that the provisions of this paragraph shall not bind any sub-tenants of the third party to perform any agreements, covenants or stipulations herein contained longer than the time any subletting to any such sub-tenants shall continue, nor in respect to any premises other than those sublet to [fol. 35] them.

Eleventh: If the third party erects any building or buildings on said land same shall be so constructed as not to depend for support upon any building on any adjacent or adjoining land. The said third party shall not be bound or obligated to construct or build any building on said land and does not contract with or obligate itself to either the first or second parties herein to construct or build any building on said land. If third party proceeds to construct or build any building on said land it must do so at its own cost and expense and third party shall not either acting for itself or as agent of first or second parties, or either of them, or in any capacity whatever have the right to nor is it authorized to bind or charge, or contract so as to bind or charge, the said land, or any part or parts thereof, with any lien, charge, encumbrance or mechanic's lien for the cost or expense, or any part of the cost or expense, of constructing or building any building on said land or for any work, labor or material done, performed or furnished upon, to or for any building on said land. In constructing or building any building on said land or in contracting for such building and construction the third party shall not have the right to and shall not in any manner represent or bind the first or second parties, or either of them, as their agent or in any capacity whatever.

Twelfth: It shall be the duty of all persons to whom notices are required or allowed by the terms hereof to be [fol. 36] given to keep the persons who may be required or allowed by the terms hereof to give such notices informed of their post office address and such information shall be given in writing by written instrument referring to this

lease addressed to Whom It May Concern and left at the place where the rent is payable. Any notice required or allowed to be given by the terms of this instrument shall be given to the persons to whom such notices are required or allowed to be given by being given to them personally if they live within the present limits of Jackson County, Missouri, and if by the exercise of reasonable diligence such notices can be given to them personally and such notices shall be deemed to be sufficiently given to any persons who do not live within the said limits of Jackson County, Missouri, or who do live within such limits and cannot by the exercise of reasonable diligence be given such notices personally, by mailing the same to them postage prepaid, to their last post office address, of which information shall be furnished as aforesaid, and by posting a copy of such notice in a conspicuous place on the premises hereby leased and by leaving a copy of such notice for them at the place where the rent is then payable, provided, however, that if any person entitled to receive any notice shall have failed to give information of its or his last post office address by written notice as herein required, then it shall not be necessary to mail to any such person any notice desired to be given. Such notices shall refer to this lease and be directed to Whom It May Concern and any notice shall be deemed sufficiently given if delivered personally [fol. 37] to the person entitled to receive the same no matter where delivered or if being mailed postage prepaid addressed to such person at any address shall be received by such person through the mails.

In case any person to whom a notice is allowed or required to be given by the terms hereof shall be a corporation, such notice may, if personally served, be given by delivery to any officer or any director of such corporation, or any person on the said leased premises in charge thereof for such corporation.

Thirteenth: The third party shall at all times at its own cost keep and put on all buildings and improvements now or hereafter situate on said lands all fixtures or appliances that may at any time be required by the laws, ordinances or regulations of any state, country, government or municipality within whose limits or jurisdiction said lands or any part or parts thereof are now or may hereafter be

situate, or by any governmental authority, and shall at all times keep all such fixtures and appliances in such condition as may be required by such laws, ordinances, regulations or governmental authority.

Fourteenth: In case the said lands or buildings or improvements now or hereafter situate thereon, or any part or parts thereof, shall be at any time during the continuance of the term of this lease taken, damaged or condemned by any public authority for any public use, the damages [fol. 38] shall, unless apportioned by the judgment, decree or proceeding allowing them, be apportioned between and among the first party and the third party in case of dispute by three disinterested persons, one chosen by the first party, one chosen by the third party and the third chosen by the two so chosen. The award of the majority of the persons so chosen shall be final. In case either party shall upon being requested by the other party fail to appoint the person so to be chosen by such party so requested, or in case the two persons so chosen fail to choose a third person then any damages shall be distributed among the parties according to their respective rights and equities by the decree of a court of competent jurisdiction.

Fifteenth: If this lease shall be by first party forfeited under the terms hereof then third party shall be bound to at once pay first party Thirty thousand Dollars ($30000.00) and if when this lease is so forfeited the third party shall pay first party said Thirty thousand Dollars ($30000.00) and deliver up and surrender to the first party the peaceable possession of the said lands, with all buildings, fixtures, improvements and appliances then thereon the third party shall be discharged of and from all liability of every kind under this lease, except that third party shall be bound to pay all rent that may have become due and payable before the time of such forfeiture and shall remain bound for the performance of all agreements herein contained that by the terms hereof should have been performed by third party before the time of such forfeiture [fol. 39] and this lease may at any time be cancelled by third party by giving first party written notice of such intention so to cancel the same and by paying to the first

party Thirty thousand Dollars ($30000.00) and by delivering up to the said first party peaceable possession of the said lands with all buildings, improvements, fixtures and appliances then thereon and upon so giving such written notice of such intention and also paying to said first party said sum of Thirty thousand Dollars ($30000.00) and also delivering to said first party such peaceable possession third party shall be discharged of and from all liability of every kind under this lease, except and provided, however, that the said third party shall not have the right to so cancel this lease unless at the time of such cancellation it shall have then paid all rents that are then due and payable under this lease and shall have then performed all agreements herein contained which by the terms hereof are to be performed by the third party before the time of such cancellation.

Sixteenth: If the time for doing any act required or allowed to be done by the terms hereof occurs on Sunday or any public holiday then such act may be done on the first succeeding day thereafter that is not a Sunday or a public holiday.

Seventeenth: At the expiration of the term of this lease either by lapse of time or by forfeiture or otherwise the third party will yield up to the first party the lands hereby leased, with all buildings, improvements, fixtures and [fol. 40] appliances situate thereon.

Eighteenth: Time is of the essence of this contract and when in any agreement, stipulation or condition contained herein any act is agreed to be done at any particular time or is forbidden to be done before any particular time then time is of the essence of any such agreement, stipulation or condition.

In Witness Whereof the said Charles A. Bruun and Myrtle M. Bruun, his wife, hereto set their hands and said Newmarket Investment Company causes these presents to be signed by W. G. Dickey, its President and its common and corporate seal to be hereunto af-

fixed, all on this first day of July, Nineteen hundred and fifteen. In duplicate.

(Seal) CHARLES A. BRUUN,
MYRTLE M. BRUUN,
NEWMARKET INVESTMENT COMPANY,
By W. G. Dickey, President.

Attest:
Geo. H. Davis,
Secy.

State of Missouri,
County of Jackson.—ss.:

On this 21st day of July, Nineteen hundred and fifteen, before me (a notary public in and for said County and State) personally appeared Charles A. Bruun and Myrtle M. Bruun, his wife, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[fol. 41] My commission expires, May 26, 1918.

In Witness Whereof I hereunto set my hand and affix my official seal the day and year first above written in this certificate.
(Seal)

CLARA E. HAYDEN,
Notary Public in and for said County and State.

State of Missouri,
County of Jackson.—ss.:

On this 29th day of July, Nineteen hundred and fifteen, before me (a notary public in and for said County and State) appeared W. G. Dickey, to me personally known, who being by me duly sworn, did say that he is the President of Newmarket Investment Company, and that the seal affixed to foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors and said W. G. Dickey acknowledged

said instrument to be the free act and deed of said corporation.

My commission expires Oct. 20, 1915.

Witness my hand and notarial seal the day and year first above written in this certificate.

(Seal)

E. J. FINLEY,
Notary Public in and for said County and State.

[fol. 42] (Memorandum Opinion of U. S. Board of Tax Appeals.)

United States Board of Tax Appeals.

Charles A. Bruun, Petitioner,
Docket No. 89454. vs.
Commissioner of Internal Revenue, Respondent.

L. E. Durham, Esq., for the petitioner.

W. W. Kerr, Esq., for the respondent.

Opper:—This proceeding involves an alleged deficiency in income tax for the year 1933 in the amount of $4,111.43.

The facts are found as stipulated by the parties.

Respondent's determination must be overruled on the authority of Louise C. Slack, 35 B. T. A. 271, and later cases to the same effect.

Decision will be entered for the petitioner.

Enter:

Entered Oct. 22, 1938.

Seal
U. S. Board of
Tax Appeals
1924

[fol. 43] (Order of Redetermination, October 22, 1938.)

United States Board of Tax Appeals,
Washington.

Charles A. Bruun, Petitioner,
Docket No. 89454. vs.
Commissioner of Internal Revenue, Respondent.

Decision.

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion entered October 22, 1938,

Ordered and Decided: That there is no deficiency in income tax for the year 1933.

Enter:

Entered Oct. 22, 1938.

Seal
U. S. Board of
Tax Appeals
1924

C. R. ARUNDELL,
Member.

[fol. 44] (Petition of Guy T. Helvering, Commissioner of Internal Revenue, for Review of Decision of United States Board of Tax Appeals.)

(Filed January 6, 1939, United States Board of Tax Appeals.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner on Review,
B. T. A. Docket No. 89454 vs.
Charles A. Bruun, Respondent on Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Comes Now Guy T. Helvering, Commissioner of Internal Revenue by his attorney James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction.

That the Petitioner on Review (hereinafter referred to as the Commissioner), is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United [fol. 45] States, appointed and holding his office by virtue of the laws of the United States; that Charles A. Bruun, the respondent on review (hereinafter sometimes referred to as the taxpayer) is an individual residing at Kansas City, Missouri; that the said Charles A. Bruun filed his Federal income tax return for the taxable year 1933 in the office of the Collector of Internal Revenue for the Sixth District of Missouri, located at Kansas City, Missouri, which said collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Eighth Circuit.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals by virtue of the provisions of the Revenue Act of 1926, Sections 1001-1005, c. 27, 44 Stat. 9, as amended by the Revenue Act of 1928, Section 603, c. 852, 45 Stat. 873, and further amended by the Revenue Act of 1932, Section 1101, c. 209, 47 Stat. 169, and as further amended by the Revenue Act of 1934, Section 519, c. 277, 48 Stat. 680, and subsequent revenue acts.

II.

Nature of Controversy.

On March 17, 1937, the Commissioner in accordance with Section 272(a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934, advised the respondent on review by registered mail that the determination of his income tax liability for the taxable year 1933, [fol. 46] disclosed a deficiency in tax of $4,111.43. Thereafter, on June 14, 1937, the respondent on review filed an appeal from said notice of deficiency with the United States Board of Tax Appeals. The Commissioner filed his answer to the petition on July 15, 1937. The case was heard on October 17, 1938; and on October 22, 1938, the Board of Tax Appeals entered its Memorandum Opinion for the taxpayer and on the same day October 22, 1938,

entered its decision ordering and deciding that there is no deficiency in income tax for the year 1933.

The case was submitted to the Board of Tax Appeals upon an agreed statement of facts. The Board adopted and found the facts as stipulated, which disclosed that between and including the first day of July, 1915 and the first day of July, 1933, the taxpayer owned real property in what is now Kansas City, Missouri, and that on July 1, 1915, he leased the said real property for a term of ninety-nine (99) years to the Newmarket Investment, a corporation, under a written indenture of lease. At the time of the execution of the lease there was a building upon said property and said building remained thereon until 1929, at which time it had an undepreciated cost to the taxpayer of $13,365.00. During 1929 the lessee demolished and removed said building from the premises and prior to December 31, 1929, it constructed a new building [fol. 47] upon said premises, which had a useful life of not more than fifty years. The lessee continued to occupy the premises and pay rent provided in said lease until March, 1933, when it defaulted in the payment of rent.

On July 1, 1933, the lessee being in default in the payment of rent and taxes, the lease was cancelled and the property, together with the building thereon, was turned over to the taxpayer herein in accordance with the provisions of the aforesaid lease.

It is stipulated and agreed by the parties to this proceeding that as at said date, July 1, 1933, the building which had been erected upon the said premises by the lessee had a fair market value of $64,245.68 and that the unamortized cost of the old building, which was removed from the premises in 1929 to make way for the new building, was $12,811.43, thus leaving a net fair market value as at July 1, 1933, of $51,434.25, for the aforesaid new building erected upon the premises of the taxpayer by the lessee.

The taxpayer did not report any income in the year 1933 resulting from the cancellation of the above lease and the taking of possession by him of said property, including the building erected thereon, as provided by Article 63 of Regulations 77 (1932) as amended by Treasury Decision 4539, C. B. XIV-1, 141, approved April 10, 1935.

[fol. 48] In auditing the taxpayer's return, the Commissioner determined that as a result of the aforementioned transaction the taxpayer realized a net gain of $51,434.25, being the difference between $64,245.68, the aforesaid value on July 1, 1933, of the building erected upon said premises by the lessee, and $12,811.43, the adjusted cost base of the building demolished and removed from the premises by the lessee in 1929.

The Board of Tax Appeals, upon the authority of Louise C. Slack, (1-19-37), 35 B. T. A. 271, and later cases decided by it, determined and held that no income was realized by the taxpayer in the year 1933, when the lease was cancelled and the property was repossessed by the taxpayer.

The Board's decision is contra and overrides the regulations promulgated by the Commissioner under the provisions of the Revenue Act of 1932, to-wit: Article 63 of Regulations 77, as amended by Treasury Decision 4539 (C. B. XIV-1, 141) approved April 10, 1935, which provide, in part, that where improvements are erected on leased land, which improvements have a life less than that of the leasehold, that in the event of the termination of the leasehold prior to the expiration of the life of the improvements the depreciated value of such improvements as at date of termination of the leashold constitutes taxable income.

[fol. 49] The sole issue involved is—whether a lessor derived taxable income in the year of the cancellation and surrender of a 99-year lease of real property to the extent of the then depreciated value of a building constructed thereon by the lessee under the terms of the lease.

III.

Assignments of Error

That the Commissioner of Internal Revenue being aggrieved by the opinion and decision of the United States Board of Tax Appeals in this proceeding, hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Eighth Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Board, which are relied upon by the Com-

missioner as the basis for this petition for review, are as follows:

1. The Board of Tax Appeals erred in holding and deciding that no taxable income resulted to the taxpayer, lessor, in the year 1933, upon the termination of a 99-year lease by cancellation and his acquisition of the property including a building with an undepreciated value, erected thereon by lessee.

2. The Board of Tax Appeals erred in not holding and deciding that the taxpayer, lessor, realized taxable income in the amount of $51,434.25 during the year 1933, by rea- [fol. 50] son of the termination of a 99-year lease by cancellation and his acquisition of possession of the property, including a building erected thereon by lessee.

3. The Board of Tax Appeals erred in holding and deciding upon the authority of its decision in the case of Louise C. Slack (35 B. T. A. 271) that the taxpayer realized no taxable income in the year 1933 by reason of the termination of a 99-year lease by cancellation and his acquisition of the land including a building erected thereon by the lessee.

4. The Board of Tax Appeals erred in that its conclusions of law are without substantial evidence to support them.

5. The Board of Tax Appeals erred in entering its decision that there is no deficiency in income tax for the year 1933.

6. The Board of Tax Appeals erred in failing and refusing to enter its decision that there is due from the taxpayer a deficiency in income tax for the year 1933 in the amount of $4,111.43.

Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Eighth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be transmitted to the Clerk of said court for filing and that appropriate

[fol. 51] action be taken to the end that the errors complained of may be reviewed and corrected by said court.

JAMES W. MORRIS,
Assistant Attorney General.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

Claude R. Marshall,
Special Attorney,
Bureau of Internal Revenue.

k 11-17-38

[fol. 52] United States of America,
District of Columbia.—ss.:

Claude R. Marshall, being duly sworn, says that he is a Special Attorney in the Bureau of Inter al Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

Sworn and subscribed to before me this 5th day of January, 1939.

GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 15, 1942.

[fol. 53] (Notice of Filing of Petition for Review and Acknowledgment of Service by Respondent on Review.)

(Filed January 18, 1939, United States Board of Tax Appeals.)

To: Charles A. Bruun, Esq., 8619 Holmes Street, Kansas City, Missouri.

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of January, 1939, file

with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 6th day of January, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 13 day of January, 1939.

CHARLES A. BRUUN,
Respondent on Review.

[fol. 54] (Notice of Filing of Petition for Review and Acknowledgment of Service by William J. Carroll, Counsel for Respondent on Review.)

(Filed January 18, 1939, United States Board of Tax Appeals.)

To: William J. Carroll, Esq., 901 National Fidelity Life Bldg., Kansas City, Missouri.

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of January, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 6th day of January, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 12 day of January, 1939.

WILLIAM J. CARROLL,
Attorney for Respondent on Review.

[fol. 55] (Notice of Filing of Petition for Review and Acknowledgment of Service by L. E. Durham, Counsel for Respondent on Review.)

(Filed January 18, 1939, United States Board of Tax Appeals.)

To: L. E. Durham, Esq., 201 First National Bank Bldg., Kansas City, Missouri.

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of January, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 6th day of January, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 13 day of January, 1939.

L. E. DURHAM,
Attorney for Respondent on Review.

[fol. 56] (Notice of Filing of Petition for Review and Acknowledgment of Service by John H. McEvers, Counsel for Respondent on Review.)

(Filed January 18, 1939, United States Board of Tax Appeals.)

To: John H. McEvers, Esq., c/o Ryland, Stimson, Mag & Thomson, First National Bank Building, Kansas City, Missouri.

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of January, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 6th day of January, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 12 day of January, 1939.

JOHN H. McEVERS,
Attorney for Respondent on Review.

[fol. 57] (Praecipe For Transcript.)

(Filed January 30, 1939, United States Board of Tax Appeals.)

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the

said Circuit Court of Appeals for the Eighth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board.

(a) Petition, including annexed copy of deficiency letter and statement attached thereto.

(b) Answer.

3. Memorandum Opinion entered October 22, 1938.

4. Decision entered October 22, 1938.

5. Stipulation of Facts with Exhibit "A" attached.

6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review:

[fol. 58] 7. Any and all orders of enlargement made by the Board with respect to the preparation and transmission of the record on review, not included in record.

8. This praecipe.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this day of , 1939.

Attorney for Respondent on Review.

[fol. 59] (Clerk's Certificate to Transcript.)

United States Board of Tax Appeals,
Washington.

Commissioner of Internal Revenue, Petitioner,
Docket No. 89454. vs.
Charles A. Bruun, Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 58, inclu-

sive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 11th day of February, 1939.

Seal
U. S. Board of
Tax Appeals
1924

B. D. GAMBLE,
Clerk, United States Board
of Tax Appeals.

Filed Feb. 15, 1939. E. E. Koch, Clerk.

Order of submission

May Term, 1939

Monday, May 22, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. Oliver W. Hammonds, Special Assistant to the Attorney General, for petitioner, continued by Mr. John H. McEvers, for respondent, and concluded by Mr. Oliver W. Hammonds, Special Assistant to the Attorney General, for petitioner.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein, with leave to petitioner to furnish additional authorities.

Opinion

United States Circuit Court of Appeals, Eighth Circuit

No. 11429—May Term, A. D. 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES A. BRUUN, RESPONDENT

On Petition to Review Decision of United States Board of Tax Appeals

[July 20, 1939]

Mr. Oliver W. Hammonds, Special Assistant to the Attorney General (Mr. Sewall Key, Mr. J. Louis Monarch, and Mr. Edward M. English, Special Assistants to the Attorney General, on the brief) for petitioner.

Mr. John H. McEvers (Mr. Reece A. Gardner and Messrs. Ryland, Stinson, Mag & Thomson were with him on the brief) for respondent.

Before GARDNER and THOMAS, Circuit Judges, and WYMAN, District Judge.

THOMAS, Circuit Judge, delivered the opinion of the court.

The petition of the Commissioner of Internal Revenue for review of a decision of the United States Board of Tax Appeals involves an alleged deficiency of income tax of Charles A. Brunn for the year 1938 in the amount of $4,111.43.

The facts were found by the Board as stipulated by the parties. The opinion is a memorandum opinion and not officially reported.

The respondent Bruun is a resident of Kansas City, Missouri. At all times material to the question presented he owned a lot located in that city. On July 15, 1915, under a written indenture he leased the lot for a term of 99 years to New Market Investment

Company, a corporation. When the lease was executed a building stood upon the lot. It remained there until 1929. During that year the lessee removed the old building and constructed a new one upon the premises, which had a useful life of not more than fifty years. On July 1, 1933, the lessee defaulted in the payment of rent, the lease was cancelled, and the lot, together with the building thereon, was turned over to the respondent taxpayer.

On July 1, 1933, when the lease was cancelled, the building erected on the premises by the lessee had a fair market value of $64,245.68 and the unamortized cost of the building removed by the lessee in 1929 was $12,811.43, leaving a net fair market value of the new building of $51,434.25 as of July 1, 1933, the date on which the lease was cancelled.

The taxpayer in his income-tax return for 1933 did not report any income resulting to him by reason of the cancellation of the lease. The Commissioner determined that as a result of the transaction he sustained a net gain of $51,434.25 and determined a deficiency of $4,111.43.

Had the lease not been cancelled it would have expired by its terms in 2014. It provided for forfeiture for nonpayment of rent, authorized the removal of the building on the premises at the date of its execution, and permitted but did not require the construction of a new building by the lessee. The lease provided that upon conditions not now material the lessee could remove the building erected by it at any time until four and one-half years prior to the expiration of the lease. It also provided that in case of forfeiture of the lease or upon its termination the premises should be surrendered with all buildings and improvements thereon.

The question presented is whether the respondent derived any taxable income in the year 1933 by reason of the cancellation of the lease and the surrender of the demised premises by the lessee.

The Commissioner contends that the net value of the building on July 1, 1933, erected by the lessee in the amount of $51,434.25 was taxable under section 22 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169. The pertinent part of the statute reads:

"Gross income includes gains, profits, and income derived from * * * commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * and income derived from any source whatever * * *."

It is the contention of the Commissioner that the net value of the building erected by the lessee was definitely realized when the lease was canceled in 1933, and is taxable income to the lessor for that year. The taxpayer contends that only an increase in the value of the real estate resulted from the transaction, and that there could be no realized gain to the lessor prior to the sale of the premises. It is settled that the income tax laws are concerned only with realized gains. Lucas *v.* American Code Co., 280 U. S.

445. The government seeks to distinguish this case from the decision of the Supreme Court in Eisner *v.* Macomber, 252 U. S. 189, in which it was held that appreciation in the value of property is merely an addition to capital and not constitutionally taxable as income until severed.

We are not here interested in whether or not the Commissioner correctly determined the fair market value of the building at the time the lease was canceled in 1933, or the amount of the gain, if any. The parties stipulated at the hearing before the Board that the net fair market value of the building as at July 1, 1933, was $51,434.25; and that

"If the Commissioner of Internal Revenue properly included in the gross income of the petitioner for 1933 the fair market value as of that time of the building constructed upon said premises by the lessee, the deficiency herein is $4,111.43. On the other hand, if his action in including the fair market value of said building in income of the petitioner was erroneous, there is no deficiency in tax."

The parties do not agree as to when the title to the building vested in the lessor. It is the general rule that whether the title to an improvement placed upon leased premises by the lessee vests in the lessor or remains in the lessee is a question of intent to be determined by the language used in the written lease. Armstrong Cork Co. v. Merchants' Refrigerating Co., 8 Cir., 184 F. 199, 209. The lease in the instant case clearly reserved the title in the lessee with right to remove the building upon certain conditions until the last 4 and one-half years of the term; but it further provided that "At the expiration of the term of this lease either by lapse of time or by forfeiture or otherwise the third party (lessee) will yield up to the first party (lessor) the lands hereby leased, with all buildings * * * thereon." The title to the building, therefore, vested in the taxpayer July 1, 1933, when the lease was cancelled and not before.

In the case of Miller v. Gearin, 9 Cir., 258 F. 225, the essential facts were the same as the facts in the present case, except that the lease provided that the ownership of all buildings put upon the premises by the lessee was to vest in the lessor immediately upon the construction of the same. The court said that "Assuming that the building was income derived from the use of the property, we think it clear that the time when it was 'derived' was the time when the completed building was added to the real estate and enhanced its value."

In the case of Hewitt Realty Co. v. Commissioner, 2 Cir., 76 F. (2d) 880, the question presented was whether a part of the value added to the taxpayer's premises by the construction of a building thereon by the tenant in 1931 was taxable income for that year. The majority of the court held that the added value was not taxable income in 1931 because it was not "something separately disposable"; and that such added value would be income in the con-

stitutional sense "only when the land is sold, and then only insofar as it increases 'amount realized' at that time."

In the case of M. E. Blatt Co. v. United States, 305 U. S. 267, 279, in which the Commissioner added to the income of a taxpayer on account of improvements made to its property by a lessee, the court said: "Granting that the improvements increased the value of the building, that enhancement is not realized income of lessor." The court then stated the test to be applied thus: "So far as concerns taxable income, the value of the improvements is not distinguishable from excess, if any there may be, of value over cost of improvements made by lessor. Each was an addition to capital; not income within the meaning of the statute. In this connection the Hewitt Realty Co. case was cited with implied approval.

Under this rule the taxpayer in the present case is in the same position with respect to income that he would have been had he constructed a building upon his premises in 1933 worth $51,434.25 in excess of cost. Such a building would have added "enhanced" or "excess" value to the real estate in that year; but it would have been only "an addition to capital; not income."

While in the cited cases the title to the improvements placed upon the leased premises by the lessee vested in the lessor under the terms of the lease at the time the improvements were made, whereas in the instant case title did not vest until the lease was terminated in a subsequent year, the principle is the same in all of them. The rule stated by the Supreme Court in the Blatt case, supra, is controlling. No income was realized by the respondent in 1933 by reason of the cancellation of the lease.

Affirmed.

United States Circuit Court of Appeals, Eighth Circuit

No. 11429

May Term, 1939

Monday, July 24, 1939

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHARLES A. BRUUN

On Petition to Review Decision of United States Board of Tax Appeals

This cause came on to be heard on the petition of the Commissioner of Internal Revenue for a review of a decision of the United States Board of Tax Appeals involving an alleged deficiency of income tax of the respondent, Charles A. Bruun, for the year 1933, in the amount of $4,111.43, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and reed by this Court that the decision of the said Board of Tax peals in this cause be, and the same is hereby, affirmed.
And it is further ordered by this Court that the petition to review this cause be, and the same is hereby, dismissed without the tax-on of costs in favor of either of the parties in this Court.
TLY 24, 1939.

United States Circuit Court of Appeals, Eighth Circuit

. E. E. Koch, Clerk of the United States Circuit Court of Appeals the Eighth Circuit, do hereby certify that the foregoing contains record on petition to review the decision of the United States ard of Tax Appeals as prepared and printed under the rules of United States Circuit Court of Appeals for the Eighth Circuit, der the supervision of its Clerk, and full, true, and complete ies of all the pleadings, record entries, and proceedings, including opinion had and filed in the United States Circuit Court of peals, except the full captions, titles, and endorsements omitted oursuance of the rules of the Supreme Court of the United States, a certain cause in said Circuit Court of Appeals wherein Guy T. lvering, Commissioner of Internal Revenue, was Petitioner, and arles A. Bruun was Respondent, No. 11429, as full, true, and com-te as the originals of the same remain on file and of record in office.

do further certify that on the seventh day of September A. D. 9, a mandate was issued out of said Circuit Court of Appeals ected to the United States Board of Tax Appeals in said cause.

n testimony whereof, I hereunto subscribe my name and affix seal of the United States Circuit Court of Appeals for the ghth Circuit, at office in the City of St. Louis, Missouri, this third of October A. D. 1939.

SEAL]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

U. S. GOVERNMENT PRINTING OFFICE 1939

Supreme Court of the United States

Order allowing certiorari

Filed November 22, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 19-0